88-1670

No.

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1988

AMERICAN AIRLINES, INC., DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., and USAIRLINES, INC.,

Petitioners,

v.

THE CITY OF CHICAGO; EUGENE SAWYER, in his official capacity as Acting Mayor of the City of Chicago; HOWARD STANBACK, in his official capacity as Commissioner of the Department of Aviation of the City of Chicago,

Respondents.

CROSS-PETITION OF AMERICAN AIRLINES, INC., DELTA AIR LINES, INC., NORTHWEST AIRLINES, INC., TRANS WORLD AIRLINES, INC., UNITED AIR LINES, INC., and USAIRLINES, INC., FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, if footnote 14 of *City of Burbank v. Lockheed Air Terminal, Inc.* (411 U.S. 624, 626) did establish a "proprietorship" exception to federal pre-emption of local control of aircraft noise and pollution, the subsequently enacted explicit pre-emptive provision of 49 U.S.C. §1305(a)(1) precludes all suits under State law for any remedy in damages (such as, class suits for massive continual recoveries on the ground of continuing trespass) the purpose and/or result of which is to affect the "rates, routes or services" of defendant airlines.

2. Whether such federal pre-emption of noise control as exists prohibits State action in respect to all matters of air space management (in-flight operations or flight patterns and schedules) and permits State action only for inverse condemnation or for the negligent use and maintenance of ground facilities.

PARTIES TO THE PROCEEDINGS BELOW

The caption of the case contains the names of all parties, except the airlines who were defendants-appellees below, namely, American Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., Trans World Airlines, Inc., United Air Lines, Inc., and USAirlines, Inc.*

* Listing of parent companies, subsidiaries and affiliates: American Airlines, Inc. (AMR Corp., Equitable Life Assurance Society of United States); Delta Air Lines, Inc. (none); Northwest Airlines, Inc. (NWA Inc.); Trans World Airlines, Inc. (Arrow Limited Partnership c/o Icahn Holding Corp.); United Air Lines, Inc. (Allegis Corporation, The Boeing Company); USAirlines, Inc. (U S Air Group, Inc.); Ozark Airlines, Inc., originally named a defendant, has been merged into Trans World Airlines, Inc.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THIS CROSS-PETITION	5
I. SECTION 1305(a)(1) OF CHAPTER 49 U.S. CODE IS AN EXPLICIT PRE-EMPTIVE STATUTE, OVER-LOOKED BY THE COURT OF APPEALS, AND PREVENTS ANY STATE COURT SUIT IN WHICH THERE IS A CONTINUING MASS DAMAGE REMEDY AGAINST THE MUNICIPAL AIRPORT PROPRIETOR	6
II. THIS COURT SHOULD CLARIFY FOR ALL LOWER COURTS, STATE AND FEDERAL, THAT IF *BURBANK* AND SECTION 1305(a)(1) DO NOT PRE-EMPT THE ENTIRE FIELD OF AIRCRAFT NOISE CONTROL, THE ONLY MATTERS NOT PRE-EMPTED FROM STATE CONTROL ARE THOSE CONFINED TO AIRPORT LAND MANAGEMENT	7
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	PAGE
Adams v. City of Atlanta, 322 S.E.2d 730 (Ga. 1984)	8n
Air Transport Association of America v. Crotti, 389 F.Supp. 58 (N.D. Cal. 1975) (3 judge court)	8
Baker v. Burbank-Glendale-Pasadena Airport, 705 P.2d 866 (Cal. 1985), *cert. den.* 475 U.S. 1017 (1986)	6
Bryski v. City of Chicago, et al., 499 N.E.2d 162 (Ill. App. Ct. 1986), *lv. to appeal den.* 505 N.E. 2d 351 (1987)	7n, 8n
City of Burbank v. Lockheed Air Terminal, Inc., 411 U.S. 624 (1973)	5, 7, 8n
Greater Westchester Homeowners Association v. City of Los Angeles, 603 P.2d 1329 (Cal. 1979), *cert. den.* 449 U.S. 820 (1980)	8
Illinois Corporation Travel v. American Airlines, Inc., 682 F.Supp. 378 (N.D. Ill. 1988)	7
O'Carroll v. American Airlines, Inc., 863 F.2d 11 (5th Cir. 1989)	7
Owen v. City of Atlanta, 277 S.E.2d 338 (Ga. Ct. of App. 1981), *aff'd* 282 S.E.2d 906 (Ga. 1981), *cert. den.* 456 U.S. 972 (1982)	8, 8n, 9
San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959)	6
San Diego Unified Port District v. Gianturco, 615 F.2d 1306 (9th Cir. 1981), *cert. den.* 455 U.S. 1000 (1982)	8n

Ursin v. New Orleans Aviation Bd., 506 So.2d 947 (La. Ct. of App. 1987), *rev'd on other grounds* 515 So.2d 1087 (La. 1987) 9

Statutes

49 U.S.C. Section 1506 6

49 U.S.C. Section 1305(a)(1) 6, 7

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THE CITY OF CHICAGO; EUGENE SAWYER, in his official capacity as Acting Mayor of the City of Chicago; HOWARD STANBACK, in his official capacity as Commissioner of the Department of Aviation of the City of Chicago,

Respondents.

CROSS-PETITION OF THE AIRLINE DEFENDANTS-APPELLEES BELOW FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The airlines who were defendants-appellees below—*i.e.*, American Airlines, Inc., Delta Air Lines, Inc., Northwest Airlines, Inc., Trans World Airlines, Inc., United Air Lines, Inc., and USAirlines, Inc.—cross-petition under Rule 19.5 of this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion below is reported at 864 F.2d 463 and is contained in the Appendix to the respective petitions for certiorari herein of petitioner Lawrence C. Bieneman (plaintiff-appellant below) (No. 88-1497) and of the City of Chicago and its Mayor and Commissioner of Aviation (No. 88-1496).

JURISDICTION

The judgment of the Court of Appeals was entered on December 13, 1988. No rehearing was requested. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The District Court had jurisdiction under 28 U.S.C. §1331.

Cross-petitioners received the Petition for Writ of Certiorari of the City of Chicago on March 15, 1989.

The jurisdiction of this Court to receive this conditional cross-petition for certiorari is invoked under Rules 19.5, 19.6 and 20.5 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Cross-petitioners adopt here and refer to the statement of the constitutional and statutory provisions involved as contained in the respective petitions for certiorari of Lawrence C. Bieneman and of the City of Chicago. For convenience of reference in connection with this cross-petition the relevant provisions of 49 U.S.C. §1305(a)(1), enacted as part of the Airline Deregulation Act of 1978, are set forth below:

> ". . . [N]o State [except Alaska] or political subdivision thereof . . . shall . . . enforce any law . . . relating to the rates, routes or services of any air carrier. . ."

STATEMENT OF THE CASE

Cross-petitioners adopt here and refer to the statement of the case contained in the respective petitions for certiorari of Lawrence C. Bieneman and of the City of Chicago and add thereto the following matters relating to the airline cross-petitioners:

The airlines were made defendants to this suit in the District Court and have responded thereto separately from the City in both the District Court and the Court of Appeals because of their separate and separable interest as parties involved directly in the in-flight and air space management aspects of aircraft noise. However, the air-

lines also have an interest in the City's position as airport proprietor. This is so for two reasons:

(1) It is alleged that the airlines, although not liable for the noise their aircraft make in flight while under absolute Federal Air Administration control, are nevertheless suable as co-proprietors ("joint venturers") with the municipal airport owner because of the terms of the Lease/Use Agreements signed by the airlines for the utilization of O'Hare International Airport (similar to the arrangements at all other hub airports) (Appendix to Petition of Lawrence C. Bieneman in No. 88-1497, A. 75-78); and

(2) the Lease/Use Agreements would appear to provide that the airlines will indemnify the City from all liabilities (including attorneys' fees and expenses), other than those resulting from the City's negligence, arising out of "suits alleging a taking of property or interests in property without just compensation, trespass, nuisance or similar suits based upon the use of the airport . . . for the landing and take-off of aircraft. . ." (Appendix to Petition of Lawrence C. Bieneman in No. 88-1497, A. 76-77).

REASONS FOR GRANTING THIS CROSS-PETITION

Not since 1973 (in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624—hereinafter "*Burbank*") has this Court addressed the problem of balancing what has become a public necessity—commercial air travel—against the property rights of those who—with advertence or by inadvertence—are owners of land affected by the noise of landings and take-offs at the airports which are a necessary part of air transportation. It is time for a current analysis of this preeminently important nation-wide issue, and it is appropriate for this Court to do so in this case where the Court of Appeals has decided a question of federal law—pre-emption of aircraft noise control—which has not been, but should be, settled by this Court. (Rule 17.1(c).)

The airline cross-petitioners support the petition of the City of Chicago. If, however, the Court should grant the petition of the City and if the Court should decide that *Burbank* admits of a proprietorship exception to total federal pre-emption of aircraft noise control, then the Court should address the questions presented by this cross-petition of the airlines. Otherwise, the uncertainty existing from the various judicial decisions which have attempted to define the extent of such an assumed proprietorship exception will continue to plague the national air transportation system.

I.

SECTION 1305(a)(1) OF CHAPTER 49 U.S. CODE IS AN EXPLICIT PRE-EMPTIVE STATUTE, OVER-LOOKED BY THE COURT OF APPEALS, AND PREVENTS ANY STATE COURT SUIT IN WHICH THERE IS A CONTINUING MASS DAMAGES REMEDY AGAINST THE MUNICIPAL AIRPORT PROPRIETOR.

Section 1305(a)(1) prohibits any State suits or judicial remedies "relating to rates, routes, or services" of the cross-petitioning airlines. Having relied on Section 1506 of Chapter 49 of the U.S. Code [A. 18, 21],* enacted long before *Burbank* found it no bar to pre-emption, the Court of Appeals failed to realize that §1305(a)(1), enacted in 1978, *is* the explicit pre-emption provision which was assumed to be lacking here.

Accordingly, the lower court's discussion of how "excessive awards", even though as effective as injunctive action in regulating conduct, are not pre-empted [A. 21] is basically flawed. *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 246-7 (1959).

The purpose and design of these purported class actions against the municipal airport proprietor for massive and never-ending damages for continuing trespass (*Baker v. Burbank-Glendale-Pasadena Airport*, 705 P.2d 866 (Cal. 1985), *cert. den.* 475 U.S. 1017 (1986)), is to control the emission of aircraft noise. It is unrealistic for the Court of Appeals to say that "Bieneman wants damages, not regulation" [A. 20]. An inverse condemnation award would meet that need. Rather, what Bieneman wants is to regulate aircraft noise by controlling the routes and services

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* Appendix references are to the Appendix to the Petition of the City of Chicago, et al., in No. 88-1496.

of the major airlines using O'Hare (the nation's busiest hub airport) by and through the threat of oppressive and continuing nuisance damage recoveries. Any liability of the Airport under State law for continuing nuisance, if passed on to the airlines under their Lease/Use Agreements, would cause the airlines to curb their routes and services and to raise their rates to the public.

To permit such suits and "allow [Illinois] courts some role in setting noise levels at O'Hare" [A. 20] by means of homeowners extorting changes in airport access, airline scheduling, types of aircraft used, etc., through the threat of massive damage remedies is clearly banned by §1305(a)(1), which applies to common law remedies in judicial proceedings as well as to other types of State action relating to rates, routes or services. *O'Carroll v. American Airlines, Inc.*, 863 F.2d 11, 13 (5th Cir. 1989); *Illinois Corporation Travel v. American Airlines, Inc.*, 682 F.Supp. 378, 379 (N.D. Ill. 1988).

II.

THIS COURT SHOULD CLARIFY FOR ALL LOWER COURTS, STATE AND FEDERAL, THAT IF *BURBANK* AND SECTION 1305(a)(1) DO NOT PRE-EMPT THE ENTIRE FIELD OF AIRCRAFT NOISE CONTROL, THE ONLY MATTERS NOT PRE-EMPTED FROM STATE CONTROL ARE THOSE CONFINED TO AIRPORT LAND MANAGEMENT.

The law of federal pre-emption of aircraft noise control has developed primarily through judicial decision. Since *Burbank* various courts have given differing dimensions to the alleged "proprietorship exception".* For example,

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* In none of these cases, except the case at bar and the Illinois decision upholding complete pre-emption (*Bryski v. City of*

(Footnote continued on following page)

compare, Air Transport Association of America v. Crotti, 389 F.Supp. 58, 65 (D.C. N.D. Cal. 1975) (3 judge court) (State "regulations of noise levels which occur when an aircraft is in direct flight" are pre-empted, but passive noise monitoring procedures innocuous to aircraft traffic and not in conflict with federal regulations are permissible) *and Greater Westchester Homeowners Association v. City of Los Angeles*, 603 P.2d 1329, 1331 (Cal. 1979), *cert. den.* 449 U.S. 820 (1980) (federal government has exclusive control over aircraft "in flight", and proprietor retains responsibility for the proper construction, operation, and maintenance of ground facilities and for land use planning designed to minimize the effects of noise); *with, Owen v. City of Atlanta*, 277 S.E.2d 338, 340 (Ga. Ct. of App. 1981) ("the fact that the location and altitude of landing operations is subject to Federal control does not in any manner determine whether the rights of a surface owner

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* *continued*

Chicago, et al., 499 N.E.2d 162 (Ill. App. 1986), *leave to appeal denied*, 505 N.E.2d 351 (Ill. 1987)), were airlines sued as defendants. Most of the cases make it expressly clear that airlines are not subject to State damage remedies, because their aircraft engines make noise only when "in-flight" under exclusive federal control, from departure gate to arrival gate. See, *San Diego Unified Port District v. Gianturco*, 651 F.2d 1306, 1315, n. 22 (9th Cir. 1981), *cert. den.* 455 U.S. 1000 (1982), for citation of authorities to this effect. Subsequent to the decision in *Owen v. City of Atlanta*, 277 S.E.2d 338 (Ga. Ct. of App. 1981), *aff'd* 282 S.E.2d 906 (Ga. 1981), *cert. den.* 456 U.S. 972 (1982), which found a "proprietorship exception" and denied pre-emption in a suit against the Atlanta Hartsfield Airport, the same court upheld the dismissal of a homeowners' suit against seven airlines "to recover damages for alleged noise and air pollution and for trespass from aircraft overflight." Citing its former *Owen* decision and *Burbank*, the court held that "Federal law and regulations preempt local control of airspace management, air traffic control, and aircraft noise and emissions." (*Adams v. City of Atlanta*, 322 S.E.2d 730, 732 (Ga. 1984).

have been violated by such flights") *cert. den.* 456 U.S. 972 (1982) *and Ursin v. New Orleans Aviation Bd.*, 506 So.2d 947, 955 (La. Ct. of App. 1987) (airport proprietors are responsible for maintaining reasonable levels of aircraft noise through regulation, and failure adequately to control aviation noise necessarily results in compensible injuries either in inverse condemnation if there is a "taking" or in damages for nuisance) *rev'd on other grounds* 515 So.2d 1087 (La. 1987).

The court below ruminates on this question (A. 22-23), and the examples given of pre-emption pretty well bear out the obvious and critical distinction that air space management (the in-flight operation of the aircraft from engines on at departure gate to engines off at arrival gate; the number of flights into the airport; the type of aircraft permitted access; the take-off or landing glide path, etc.) is and must be pre-empted. On the other hand, certain limited matters do not impinge upon in-flight operations, airline routes and scheduling, or airline services, such as matters of airport land management relating to condemnation claims (*e.g.*, buffer zone creation; careful runway placement, etc.) or such as matters of airport maintenance relating to claims of negligence in the use or operation of airport anti-noise equipment (*e.g.*, noise baffles).

With the existing uncertainty of judicial standards in the lower courts throughout the nation, the issue of the extent of the federal pre-emption of aircraft noise control is an important question of federal law raised by the decision below which has not been, but should be, settled by this Court.

CONCLUSION

If the petition for certiorari of the City of Chicago is granted, this cross-petition should be granted in order to clarify an important area of federal law which has not been, but should be, settled by this Court.

Respectfully submitted,

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Cross-Respondents.

CROSS-RESPONDENT BIENEMAN'S BRIEF IN OPPOSITION TO THE CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
REASONS FOR DISMISSING, OR IN THE ALTERNATIVE DENYING, THE CROSS-PETITION	1
I. THE CROSS-PETITION SHOULD BE DISMISSED AS UNTIMELY	1
II. NOTHING IN THE AIRLINE DEREGULATION ACT OF 1978 PREEMPTS THE POWER OF AIRPORT PROPRIETORS TO CONTROL NOISE OR THE CONCOMITANT LIABILITY OF AIRPORT PROPRIETORS UNDER STATE LAW DAMAGE REMEDIES TO PAY COMPENSATION FOR THE INJURIES CAUSED BY AIRPORT NOISE	3
A. The Constitutional Imperative: State Law Is To Be Preserved Absent "Clear And Manifest" Congressional Intent To Preempt	3
B. There is No Evidence Of Congressional Intent To Preempt State Law Damage Remedies Nor Is There Any Clear And Convincing Evidence Of Congressional Intent To Bar The Airport Proprietor's Long-Standing Authority To Control The Use Of Its Airport To Limit Aircraft Noise Injury: Indeed, The Evidence Is To The Contrary	6
III. THERE IS NO CONFLICT IN JUDICIAL DECISIONS AS TO THE SCOPE OF PROPRIETOR AUTHORITY TO CONTROL NOISE	9
CONCLUSION	12

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REASONS FOR DISMISSING, OR IN THE ALTERNATIVE DENYING, THE CROSS-PETITION

I. THE CROSS-PETITION SHOULD BE DISMISSED AS UNTIMELY.

The preliminary issue before this Court as to the Airlines self-styled "Cross-Petition" is whether the Airlines should be allowed to evade the spirit and likely the letter of the ninety day statutory deadline mandated by 28 U.S.C. Section 2101(c). Although phrased in slightly dif-

ferent terms, Petitioner City of Chicago and Cross-Petitioner Airlines raise the identical issue: whether federal statutory law has preempted state law damage remedies. Chicago timely filed a petition for certiorari within the ninety day statutory deadline. The Airlines did not, and let the ninety day statutory deadline pass. Moreover, the Airlines have failed to meet the requirements of either Rule 19.5 or 19.6 of this Court, the exceptions to the ninety day deadline, and therefore have failed to file a timely petition.

The issue as to the application of Rule 19.5 to the Airlines' Cross-Petition is straightforward. May the cross-petition provision of Rule 19.5 be used by one unsuccessful litigant to file an otherwise untimely challenge to the Court of Appeals decision on virtually the identical grounds raised by a fellow unsuccessful litigant who filed a timely petition?

Such tactics violate the spirit if not the letter of Section 2101(c) and Rule 19.5. The apparent purpose of Rule 19.5 is to allow an opposing litigant to raise *additional* issues for consideration by this Court in response to issues raised by a petitioner hostile to the cross-petitioner's interest. Here, in contrast, the interests of the original Petitioner City of Chicago and the Cross-Petitioner Airlines are substantially the same and the issue raised by both is identical: whether federal statutory law has preempted state law damage remedies.

Nor does Rule 19.6 apply to the Airlines' Cross-Petition. Rule 19.6 provides that when a respondent, here the Airlines, wishes to respond to a petition that the respondent supports—here the Petition of the City of Chicago—the respondent must file the response within twenty days of the filing of the petition. The Airlines have failed to meet that deadline. Therefore, the Cross-Petition of the Air-

lines is not timely filed and should not be accepted by this Court.

Given the parallelism of interest and similarity of basic issues raised for consideration by Chicago and the Airlines, the Airlines should not be permitted to evade the ninety day deadline of Section 2101(c). The Cross-Petition should be dismissed as untimely.

II. NOTHING IN THE AIRLINE DEREGULATION ACT OF 1978 PREEMPTS THE POWER OF AIRPORT PROPRIETORS TO CONTROL NOISE OR THE CONCOMITANT LIABILITY OF AIRPORT PROPRIETORS UNDER STATE LAW DAMAGE REMEDIES TO PAY COMPENSATION FOR THE INJURIES CAUSED BY AIRPORT NOISE.

A. The Constitutional Imperative: State Law Is To Be Preserved Absent "Clear And Manifest" Congressional Intent To Preempt.

To properly apply the doctrine of preemption to this controversy, it is essential that this Court re-examine the constitutional framework allocating power between the federal government and the states. Central to this framework is the Tenth Amendment mandate that only those powers specifically enumerated in the Constitution are granted to the federal government with the vast residuum of powers granted to the states. Among the reserved powers left to the states was the power to provide tort law remedies under state law to redress injuries to states' citizens.[1]

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[1] "The provision of tort remedies to compensate for personal injuries 'is a subject matter of the kind . . . traditionally regarded as properly within the scope of state superintendence.' " *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1542 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984), quoting *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 144 (1963).

Thus, *preservation of state power* is at the core of constitutional federalism. The doctrine of "preemption" grounded in the Supremacy Clause of Article VI creates a limited exception to this basic allocation of power to the states. Preemption of state power is the constitutional *exception—not the rule.*

The federal lawmaking power to preempt state power reserved by the Constitution lies with the Congress—not the Judiciary. For the Judiciary to find that Congress has preempted state law, there must be clear and convincing evidence of Congressional intent to preempt. For the Judiciary to preempt in the absence of such intent would be a usurpation by the Judiciary of preemptive power reserved to the Congress as well as a judicial usurpation of constitutionally preserved state power, reserved to the states under the Tenth Amendment.

This basic constitutional framework of federalism—with residual state power preserved absent clear and manifest evidence of *Congressional* intent to preempt—has been repeatedly emphasized by this Court:

> In determining whether a state statute is preempted by federal law and therefore invalid under the Supremacy Clause of the Constitution, our *sole* task is to ascertain *the intent of Congress.*
>
> *California Federal Savings & Loan Association v. Guerra*, 479 U.S. 272, 107 S.Ct 683, 689 (1987) (emphasis added).

> This Court has repeatedly refused to void state statutory programs, absent congressional intent to preempt them. 'If Congress is authorized to act in a field, it should manifest its intention clearly. It *will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention* to

> do so. The exercise of federal supremacy is not lightly to be presumed.'
>
> *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405, 413 (1973), quoting *Schwartz v. Texas*, 344 U.S. 199, 202-203 (1952) (emphasis added).
>
> [The power of the state is] not to be superseded by the Federal Act unless that was the *clear and manifest purpose* of Congress.
>
> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (emphasis added).

The simple fact that Congress legislates in a general area which is also occupied by various state laws does not *ipse dixit* mandate preemption. Concurrent exercise of both federal and state power exists in many areas *without* preemption of state law. *See, e.g., CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69 (1987); *Louisiana Public Service Comm'n. v. FCC*, 476 U.S. 355 (1986); *New York State Dept. of Social Services v. Dublino*, 413 U.S. 405 (1973); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973).[2]

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[2] The fundamental inquiry remains Congress' intent to preempt. Where Congress has not demonstrated a clear and manifest intent to preempt, it is the Judiciary's constitutional duty to preserve the power allocated to the states "to reconcile the operation of both statutory schemes with one another rather than holding one completely ousted." *Merrill Lynch*, 414 U.S. 117, 127 (1973).

B. There is No Evidence Of Congressional Intent To Preempt State Law Damage Remedies Nor Is There Any Clear And Convincing Evidence Of Congressional Intent To Bar The Airport Proprietor's Long-Standing Authority To Control The Use Of Its Airport To Limit Aircraft Noise Injury: Indeed, The Evidence Is To The Contrary.

When one examines the relevant statutory language and legislative history, there is no evidence of Congressional intent to preempt state law damage remedies for those injured by aircraft noise. Indeed, the evidence is to the contrary. In Section 1106 of the Federal Aviation Act of 1958, 49 U.S.C. Section 1506, Congress explicitly preserved such remedies. (See discussion in Respondent Bieneman's Brief In Opposition to the City of Chicago's Petition for Certiorari in No. 88-1496, at pp. 4-7.)

Nothing in this Court's 1973 decision in *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), supports preemption of state law damage remedies. In *Burbank*, this Court never addressed the question of Congressional intent to preempt state law damage remedies for injuries caused by aircraft operations. This Court never discussed Congress' explicit anti-preemption provision (Section 1106) as to state law remedies, probably because the issue of state law damage remedies was not before it.

Nor did this Court in *Burbank* determine that airport proprietors were barred by federal law from imposing restrictions on the use of their airports. The dictum in footnote 14—that proprietors can impose restrictions on the use of their airports to reduce the injury caused by aircraft noise—is wholly consistent with the clear and long-standing understanding of the Executive Branch and Congress that there is no preemption of such local proprietor power. (See discussion in Respondent Bieneman's Brief

In Opposition to the City of Chicago's Petition for Certiorari in No. 88-1496, at pp. 8-11.)

At most, *Burbank* should be considered as perhaps an overreaching exercise of judicially crafted implied preemption that was limited to the exercise of the *police* power by the states. (See dissenting opinion of now Chief Justice Rehnquist in *Burbank*.)[3] There was certainly no evidence of Congressional intent to restrict the authority of the proprietor.

Nor is there anything in the Airline Deregulation Act of 1978 which suggests that Congress intended to restrict the powers of airport proprietors to control noise. Airline Cross-Petitioners rely heavily on the provisions of 49 U.S.C. Section 1305(a)(1):

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[3] *Burbank* is limited to an implied Congressional restraint on the *police* power of the States. *Burbank* did not affect the State's power to control its political subdivisions. Where a proprietor of an airport is a municipal government, the State—as the creator of that political subdivision—is free to expand, contract or modify the powers of that political subdivision. The municipal proprietor's authority to build and operate the airport rests on the authorization granted by the State legislature and the State legislature is free to condition continuing authorization on the political subdivision's exercise of restraint in permitting noise injury. It has long been established that a political subdivision of a State is subject to the will of the State legislature, since the political subdivision is a creature of the State. *See, Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36 (1933); *City of Newark v. State of New Jersey*, 262 U.S. 192 (1923). There is nothing in the federal Constitution or federal statutes which empowers the federal government to intrude on the ability of a State to change or modify the authority of its political subdivisions or to allocate authority between the State and various political subdivisions. The Seventh Circuit below reaffirmed this basic principle: "Neither the Constitution nor the Federal Aviation Act, as amended by the Noise Control Act of 1972, determines how Illinois apportions its governmental powers." *Bieneman v. City of Chicago, et al.*, 864 F.2d 463, 471-472 (7th Cir. 1988).

> [N]o State or political subdivision thereof . . . shall . . . enforce any law . . . relating to rates, routes or services of any air carrier. . . .

This is desperation bootstrapping. In the Airline Deregulation Act, Congress was focusing solely on the issues of fares and routes. Congress did not want the states to impose state fare and route restrictions in place of the old CAB federal economic restrictions on fares and routes that Congress was discarding. Section 1305(a) has nothing to do with state law damage remedies for injuries caused by aircraft noise or indeed for state law damage remedies for any aircraft related injury, e.g., remedies for crash victims in the plane and on the ground.

Indeed, Congress recognized the continuing liability of airport proprietors and their concomitant authority to impose restrictions to control airport noise. Not mentioned by the Airline Cross-Petitioners is Section 1305(b)(1) of that same statute. That section provides:

> Nothing in subsection (a) of this section shall be construed to limit the authority of any State or political subdivision thereof or any interstate agency or other political agency of two or more states as the owner or operator of an airport served by any carrier certificated by the Board to exercise its proprietary powers and rights.

Congress clearly did not want section 1305(a) to be construed as in any way preempting the traditional responsibility and concomitant authority of airport proprietors to impose local controls. Not only did Congress explicitly so state in Section 1305(b) but this intent is reflected in the legislative history. The following colloquy took place between Senator Kennedy and the bill's Senate sponsor, Senator Cannon:

> Mr. KENNEDY. I am concerned that the *long recognized powers of the airport operators to deal with noise and other environmental problems at the local level* may be inadvertently curtailed by this section [Section 1305(a)]. Am I correct in stating that the actions of airport operators presently accepted as valid exercises of proprietary powers, are not intended to be interpreted as "relating to . . . routes or services" of air carriers and are not intended to be preempted by the powers created by this section?
>
> Mr. CANNON. That is correct.
>
> 124 Cong. Rec. 37419-37420, October 14, 1978 (emphasis added).

Thus, the Airlines' attempt to use Section 1305(a) as the pretext for the preemption of state damage remedies caused by airport noise and of the concomitant authority of airport proprietors to control noise must fail. There is no evidence of a Congressional intent to preempt, let alone the "clear and convincing" evidence needed to constitutionally support the ouster of state and local power.

III. THERE IS NO CONFLICT IN JUDICIAL DECISIONS AS TO THE SCOPE OF PROPRIETOR AUTHORITY TO CONTROL NOISE.

The Airline Cross-Petitioners suggest that there is confusion among existing judicial decisions as to the scope of proprietor authority to control noise. There is no such confusion. The Airlines' position stems from a misunderstanding of the respective roles of the federal government and the airport proprietor.

No one suggests that an airport proprietor can tell an airline how high to fly its planes or impose other requirements on the operation of the plane in the air. Such regulation quite properly belongs in the domain of the

Federal Aviation Administration which is responsible for in-flight safety.

Conversely, the federal government has no statutory (and probably no constitutional authority) to tell a state or local government airport operator that it must accept a *minimum* number of flight operations or accept those operations at all, let alone in a particular location. The decision of where to put an airport, how many airplanes to allow to fly in to that airport, and how noisy the planes that use the airport can be, lies in the hands of the airport proprietor.[4]

The relationship between the relative authority of the proprietor and the FAA is illustrated by the *maximum and minimum* number of flights that can use the airport. One flight may not cause noise injury, but tens of thousands of flights may overwhelm the surrounding community and cause significant noise injury. There is no question that the FAA may limit the *maximum* number of flights that can use an airport so as to promote air safety. But the FAA cannot dictate to the airport proprietor that the proprietor must accept a *minimum* number of flights. That decision—which is fundamental to how much noise injury is inflicted on a given locality—rests with the airport proprietor who selects both the size and location of the airport property.

Indeed, the very case law cited by the Airlines supports this position. In *Air Transportation Association v. Crotti*,

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[4] In their "Cross-Petition" the Airlines have finally acknowledged for the first time that they have agreed to indemnify the proprietor City for all tort suits based upon use of O'Hare Airport for landing and take-off of aircraft. (See Airlines' Cross-Petition at p. 4.)

389 F.Supp. 58, 63 (N.D. Cal. 1975), a three-judge federal court upheld a state statute providing for mandatory Community Noise Equivalent Level (CNEL) restrictions for airports and sustained on their face proprietor restrictions which included restrictions on the use of noisy aircraft, curfews, and restrictions on flight frequency.[5] Nothing in *Greater Westchester Homeowners Association v. City of Los Angeles*, 26 Cal.3d 86, 160 Cal. Rptr. 733, 603 P.2d 1329 (1979), *cert. denied*, 449 U.S. 820 (1980)—also cited by the Airlines—suggests a lesser level of authority. Indeed, all the cases that have addressed the issue of proprietor control—as well as the statements of the FAA—have acknowledged a broad level of authority in the airport operator to limit the number of flights, the types of noisy aircraft, and the timing of flights at a given airport. (See discussion in Respondent Bieneman's Brief In Opposition to the City of Chicago's Petition for Certiorari in No. 88-1496, at pp. 8-11 and cases cited at pp. 10-11.)

[5] The court sustained on their face restrictions which included: "reduction of flight frequency, particularly in the most noise sensitive time periods and by the noisier aircraft". 389 F.Supp at 61.

CONCLUSION

For all the foregoing reasons, Cross-Respondent Lawrence C. Bieneman respectfully requests this Court to dismiss, or in the alternative to deny the Airlines' Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

Respectfully submitted,

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